Employment law – the fundamentals a retailer should know – Part 2

This month, **Stuart Jackson** returns to the important matter of employment law for retailers and how to deal with discipline.

The most potentially explosive employment situation that retailers will encounter on a regular basis is that of discipline.

Unfair dismissal

An action taken by an employer on discipline can lead to "unfair" or "automatically unfair" dismissal claims. The former is where an employee challenges the working conditions or reasons for dismissal while the latter is related to an employer's breach of law or process.

These separate categories of claim can also combine in quite devastating fashion. For instance a retailer may, in principle, quite properly discipline or dismiss an employee for a well-documented act of negligence, yet by not conducting the discipline process correctly, be successfully challenged at a tribunal for "automatically unfair" dismissal.

This latter definition focuses solely on whether the rights of the worker were protected by legal process and where that is shown to have been denied them, the employer may be forced to pay compensation.

In a case where a tribunal finds that the reasons for dismissal were not "fair" and then discovers that the dismissal was additionally carried out without lawful process, the amount of compensation for the original unfair decision can be increased by up to 50 per cent.

It is not so much that the current process or principles are ill founded, more that they require such resources to complete with confidence that owner-operated businesses find it almost impossible to follow.

It is another example of the huge burden placed on SMEs required to conduct themselves in the same manner as a dedicated human resources department of a giant corporation.

Discipline procedures

Good disciplinary procedures should be designed to establish facts quickly, be non-discriminatory, consistent, transparent and state that no action will be taken until the matter has been investigated.

Discipline falls broadly into two categories; "misconduct" and "gross misconduct". The former requires a warning as part of a series of warnings that may lead to dismissal while the latter can leap the series of steps to an immediate dismissal hearing.

If conduct warrants a warning rather than immediate dismissal, employers must instigate a structure that permits an employee the opportunity to improve performance before dismissal becomes an issue. A first written warning, followed by a second written warning and a final warning is ideal before a dismissal would take place.

Each of these four stages requires a formal hearing, the process for which should be outlined in the contract of employment.

Before each hearing the employee must be informed of the reason for the hearing, the type of warning being considered, that they have the right to be accompanied by a union representative or another member of staff and be reminded of their right of appeal.

It is good practice to convene a hearing during the employee's (and any witness') normal working hours or if that is not possible, at a mutually agreeable time. Employees do have the right to a reasonable postponement of the hearing if their chosen companion is unavailable at the time the employer proposes.

At a hearing

The panel representing the employer should contain at least two senior people, one of whom should introduce those present and explain the purpose of the hearing to the employee.

State precisely what the complaint is and outline the case briefly by going through the evidence that has been gathered. Ensure that the employee and any companion are allowed to see statements made by witnesses.

Give the employee the opportunity to state his/her case and answer any allegations that have been made. They must also be able to ask questions, present evidence and call witnesses. The accompanying person may also ask questions and should be able to confer privately with the employee.

If appropriate, establish whether the employee is prepared to accept that he/she may have done something wrong. Then agree the steps which should be taken to remedy the situation.

Adjourn, however briefly, before taking any decision on the issue of a warning. Keep detailed minutes but be aware that these and any private notes must be made available to the employee after the hearing.

Should the hearing find against the employee, all warnings will state the level of improvement required, the date by which it has to be achieved and what will happen if it is not achieved.

It is good practice to attach a time limit (such as six months) after which the offence will be deleted from their records. The more serious the offence the longer the time limit. In exceptional circumstances, it may be appropriate to permanently record serious misconduct.

Finally, advise employees that any appeal against a disciplinary decision must be placed in writing and submitted within five working days. Such appeal must be heard formally using the same conditions described above. A senior member of staff not involved in the original action (if possible) will hear the appeal and decide the case.

Further steps

A second written warning will be issued when no improvement in conduct/performance or a further offence in relation to working practice occurs. If conduct remains unsatisfactory a final written warning will make it clear any further misconduct will result in dismissal.

Remember at each warning and dismissal stage, the full hearing procedure described earlier must be adhered to.

Fully embracing the above procedures will demonstrate good practice and lawful process, protecting the employer from tribunal claims for automatically unfair dismissal.

Gross misconduct

For conduct to be considered grossly unacceptable it must be a serious offence such as theft, fraud, deliberate falsification of company records, fighting, assault on another person, sexual or racial harassment, being unfit for work through alcohol or illegal drugs, gross negligence or gross insubordination.

If the offence warrants immediate dismissal the actual act of dismissal still requires a full disciplinary hearing as described earlier. The only difference is that gross misconduct bypasses the four step warning stage.

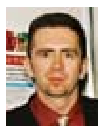
To avoid an employee who is allegedly responsible for a serious breach of conduct continuing to work while a hearing is arranged, it may be desirable to suspend him or her.

Unless specifically stated otherwise in their contract, any period of suspension must be "with pay". It is good practice, in the eyes of a tribunal, to always suspend with pay. This creates the perhaps distasteful scenario of a retailer catching an employee stealing and then having to continue paying them until a hearing can be convened.

Summary

The fact remains that employers can still discipline and dismiss deserving employees, it is just that it cannot be done without very considered process. To fail in that process can permit an employee, irrelevant of the case against him/her, to turn the tables on an employer.

In next month's final instalment we delve into the intricacies of unfair and automatic dismissal. This article is for general guidance only. Employment law is complex and professional legal advice must always be sought before taking any action. HFB



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